STATE OF MICHIGAN

IN THE SUPREME COURT

AMERICAN ALTERNATIVE INSURANCE COMPANY, INC., and DVA AMBULANCE, INC.,

Plaintiffs-Appellees,

v

FARMERS INSURANCE EXCHANGE, a/k/a FARMERS INSURANCE COMPANY, FARM BUREAU INSURANCE COMPANY, COATES MASONRY, INC., and CRIPPLE CREEK, INC.,

Defendants,

and

DONALD JEFFREY YORK,

Defendant-Appellant.

Supreme Court No.

Court of Appeals No. 227917

Lower Court No. 98-2851-CK
Shiawassee County Circuit

(248) 519-9000

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PLAINTIFFS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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QUESTION PRESENTED FOR REVIEW

1. DID THE COURT OF APPEALS ERR IN REVERSING THE TRIAL COURT AND DETERMINING THAT MR. YORK'S CONDUCT WAS "WILLFUL AND WANTON" BUT NOT OF THE NATURE TO SATISFY THE "INTENTIONAL" HARM REQUIREMENT FOUND IN MCL 500.3135(3).

   Plaintiffs-Appellants answer "Yes"
   Defendant-Appellee answers "No"

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STATEMENT OF JURISDICTION AND RELIEF SOUGHT

Plaintiffs/Appellants rely on MCR 7.301 as a basis for jurisdiction with this Court. Plaintiffs/Appellants appeal the June 25, 2002, decision of the Michigan Court of Appeals which reversed the trial court's bench trial decision in favor of Plaintiffs/Appellants and remanded the case to the trial court for further proceedings. (See, Court of Appeals' Opinion and Order attached hereto as **Exhibit 5**). Plaintiffs respectfully request that this Court grant leave to clarify application of MCL 500.3135(3)(a) and define "intentional" as contained therein. Ultimately, Plaintiffs/Appellants respectfully request that this Court reverse the decision of the Michigan Court of Appeals and reinstate the trial court's judgment entered in favor of Plaintiffs/Appellants in the amount of $61,000 plus interest and statutory costs for reimbursement of no-fault benefits paid by plaintiff for damage caused by Defendant/Appellee to an ambulance owned by Plaintiff's insured, DVA Ambulance Company.

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Facts

On December 23, 1997, the Defendant York was operating a motor vehicle under the *influence of alcohol*, when he disregarded a stop sign at the intersection of Garrison and Bryon Roads, in Shiawassee County. As a direct result of York's conduct in operating his vehicle under the influence of alcohol, Mr. York's vehicle broadsided an ambulance owned and operated by DVA Ambulance Company which is insured by Plaintiff AAIC. (**Complaint Exhibit 1**, paras 11-14; Transcript of Motion for Summary Disposition and Trial Proofs (Tr), pp 13, 46-47, 52, **Exhibit 2**).

Earlier in the evening, Mr. York had attended a Christmas party thrown by his employer at the Crossroads Inn (Tr, pp 46-47, **Exhibit 2**). Prior to attending the party where alcohol was to be served, Mr. York made arrangements with his wife to pick him up from the party (Tr, p. 57 Cross-examination of York **Exhibit 2**; Deposition of York, p. 17, attached hereto as **Exhibit 3**). He intended to leave his vehicle at the Crossroads Inn and drive home with her, his "designated driver" (Tr, p 48**; Exhibit 2**). York made these arrangements because he intended to consume alcohol and did not want to drive (Tr, pp 48-49, 57, 75, **Exhibit 2**). While at the Crossroads, York did, in fact, consume alcohol. According to his deposition testimony and the stipulation of the parties, he consumed

approximately one and one-half beers per hour (Tr, pp 41-42; Cross-examination of York, Tr, p. 57, **Exhibit 2**). He also consumed a shot of liquor (Tr, p 57). After consuming alcohol, Mr. York called his wife to pick him up in accordance with their plan. (Tr, pp 55-57, **Exhibit 2**). However, after his wife arrived, the plans changed and Mr. York drove away with a co-worker following him. Mr. York ignored the intended designated driver plan and consciously chose to drive his vehicle home. He made this change without notifying his wife who was waiting on the other end of the parking lot for ten minutes not realizing he had driven away (Tr, pp 60-63, 82-83, **Exhibit 2; Exhibit 3**, pp. 18-23).

For purposes of this action, it is significant to note that at the time that Defendant York entered the subject intersection under the influence of alcohol, he not only disregarded a stop sign controlling the subject intersection, but, because of his intoxicated state, also disregarded the DVA ambulance which was in the process of transporting patients injured in a previous motor vehicle accident (Tr, p 34, **Exhibit 2**). As a result of his conscious and willful actions in operating his vehicle under the influence of alcohol, disregarding a stop sign, and disregarding an emergency vehicle traveling through the intersection with headlights, Defendant York broadsided the DVA ambulance, killing one of its patient passengers, Mr. James Coates. Defendant York was arrested and ultimately **PLED NOLLE CONTENDRE** to the charge of *operating a vehicle under the*

influence of alcohol causing a death.[1]

Prior Proceedings

Defendant brought a motion for summary disposition based on the argument that Mr. York's conduct did not fall under the intentional act exception for personal property benefits found at MCL 500.3135(3)(a). Defendant argued that Plaintiffs' complaint solely pled willful and wanton conduct which was not sufficient to satisfy the intentional act exception. Plaintiffs argued that more than willful and wanton conduct was plead. Notwithstanding, according to Michigan case law, willful and wanton was the same as intentional and therefore, MCL 500.3135(3)(a) was satisfied. Citizens v Lowery, 159 Mich App 611 (1987). (See, Briefs and Motions and Tr, pp 4-28, **Exhibit 2**).

On May 3, 2000, the Trial Court denied Defendant's motion for summary disposition. The court noted that willful and wanton conduct is more than mere negligence and stated:

> If one willfully injures another, or if his conduct in doing the injury is so wanton or reckless that it amounts to the same thing, he is guilty of more than negligence. The act is characterized by willfulness rather than by inadvertence, it transcends negligence, is different in kind." And according to this case quoting from the Gibbard court, the willful and wanton misconduct is in the same class as

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[1] In Michigan, the operation of a vehicle under the influence of liquor, *causing death*, is a *general intent* crime requiring a culpable mental state on the part of the defendant. It also requires that the proof of the Defendants mens rea (intent), and that the mens rea have a causal relation to the harm caused. A conviction for operating a vehicle under the influence of alcohol causing death in Michigan is a felony punishable by imprisonment for up to 15 years. See MCLA 257.625(4); see also People v Lardie, 452 Mich 231, at page 267 (1996). The Defendant York in this case *pled nolle contendre* to this felony.

intentional wrongdoing. (Tr, p 32).

The court determined that Mr. York's decision to disregard a designated driver plan and to drive himself home constituted intentional conduct. Specifically the court stated:

> There's a plan put in place and that plan to have a designated driver, somebody sober, for whatever reason is abandoned. The reason that it didn't follow through or was abandoned is not so important as the fact that Mr. York **decides** to drive. That's an intentional act, it's an intentional decision on his part, and this Court feels that in line with the Lowery type of analysis that does not amount to an intentional act under the insurance plan here, under the policy that was in effect and that, therefore, the motion for summary disposition ...is denied because, again, I think that this is an exception as an intentional act to the section that you've been citing. (Tr, p 35, **Exhibit 2**).

On that same date, the case proceeded to bench trial. (Tr, pp. 40-107, **Exhibit 2**) After proofs and testimony, the court found in favor of Plaintiffs. The court ruled - - consistent with the ruling relative to Defendant's Motion for Summary Disposition - - in detail as follows:

> "I[t] seems like the prior arrangement that the Yorks had would be a model, or an ideal, for people in general. And, however, the departure from their own plan, both the general plan that they had to become each other's designated driver – and, specifically, for Mrs. York on this occasion to be the designated driver at a party she was not in attendance – and then a specific plan on the evening wherein there is not one, but two calls from the party by Mr. York which evidenced following through on his prearrangements with his wife for her to pick him up and become the designated driver. So everything seemed to be in place and, again, what every law enforcement agency or public safety entity would encourage people to do.

It is the departure from that plan, or the abandonment of it on the part of the Defendant, that resulted in the tragedy in this case and, specifically, what's involved here is the damage to the DVA Ambulance. And this court finds that in deciding to drive solo, to drive that is, to operate his motor vehicle in an apparent condition to him, at least, of intoxication – and I say apparent, and the indicia for that is everything that preceded the calls to his wife to pick him up, that he was at the party, that he had been drinking, that that was the intent – all of that pre-staged this chain and series of events that were in place. So in terms of the statute and the policy, this court feels – and, again, I think the Lowery case is pretty much in point, not because there should be an arbitrary application to all facts where there's a drunk or intoxicated driver, but for the reasons I already stated in the Summary Disposition Motion, I feel that in the analysis here there is an application of the exception and in the case before the court there is tort liability here.

The court finds that the act of driving here on the part of Mr. York was intentional, that under the circumstances that this factual scenario I have laid out here that the intentional act is willful and wanton and, again, in the words of the Gibbard case, 'if one willfully injures another, or if his conduct in doing injury is so wanton or reckless that it amounts to the same thing, he is guilty of more than negligence. The act is characterized by willfulness rather than by inadvertence, it transcends negligence, is different in kind.' We don't have inadvertence here, as I tried to articulate on the Summary Disposition ruling; rather, we have an intentional act, the agreement of the Defendant and his wife. She follows through, she comes out to pick him up, they don't make a conscious agreement or change their agreement at time; in fact, she reiterates the agreement when she states we'll caravan; she says get into the van, and he then takes a different course without her knowledge or consent and drives home alone. So those are all the indicia in the analysis in this case that amount to the intentional act, or the willfulness and wantonness, and the court so finds..."

Tr, pp. 104-107, **Exhibit 2**

On May 26, 2000, the court entered a judgment in favor of Plaintiffs in the amount of $61,000.00 plus interest and statutory costs. (See, Judgment attached

hereto as **Exhibit 4**). On June 16, 2000, Defendant appealed the decision of the trial court. Defendant argued that the trial court improperly determined that "willful and wanton" constitutes "intentional". In addition, Defendant argued that the trial court's conclusion that York's conduct was willful and wanton and rose to the level of intentional was clearly erroneous.

Plaintiffs contended that a strong line of Michigan case law supported the trial court's determination that "willful and wanton" conduct equates with "intentional" conduct. In addition, Plaintiffs argued that the trial court correctly determined that York's conduct rose to the level of intentional so as to trigger the exception from immunity found in §3135(3)(a) of the No-Fault Act.

On June 25, 2002, the Court of Appeals issued an opinion in favor of Defendant reversing the trial court's decision and remanding the case to the trial court for further proceedings (See, Opinion Order of Court of Appeals attached hereto as **Exhibit 5**).[2]

First, the court addressed the definition of the term "intentional" as found in MCL 500.3135(3)(a). The court cited Citizen's Insurance Co. v Lowery, 159 Mich

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[2] It should be noted that the facts as delineated by the Court of Appeals are slightly inaccurate. In the facts as stated, Mr. York made the decision to institute a designated driver plan for the first time when he called his wife from the bar to come pick him up (Court of Appeals Opinion, p. 1, attached hereto as **Exhibit 4**) However, what actually occurred was that prior to even attending the office party, Mr. York set up a designated driver plan with his wife because he knew that he intended to consume alcohol at the party. When he made the phone call to his wife, he was initiating the process of following through with the previous designated driver plan. However, he later decided to abandon said plan. (Tr; pp. 46-49, 55-57, 60-63, 75, 82-83).

App 611; 407 NW2d 55 (1987), (which relied on Gibbard v Cursan, 225 Mich 311; 196 NW 398 (1923)), wherein the court states "if one willfully injures another, or his conduct in doing the injury is so wanton and reckless that it amounts to the same thing, he is guilty of more than negligence. The act is characterized by willfulness, rather than inadvertence, it transcends negligence...." (**Exhibit 5**, p. 2). The court also cited Boumelhem v Bic Corp., 211 Mich App 175, 185; 535 NW2d 574 (1995), wherein the court relying on Burnett v City of Adrian, 414 Mich 448; 326 NW2d 810 (1982), and Lowery, 159 Mich App 611, stated: "willful and wanton misconduct is not high degree of negligence; rather, it is in the same class as intentional wrongdoing." (**Exhibit 5**, p. 3).

Relying on these cases, the Court of Appeals determined that although the term "intentional" as contained in §3135 is unambiguous, the phrase "willful and wanton" may be substituted for intentional only to the extent that it has the same meaning as intentional. (**Exhibit 5**, p. 3). On the other hand, the court noted that when willful and wanton is read to include conduct less than intentional, such as recklessness, than it would not implicate §3135. (**Exhibit 5**, p. 3). Consequently, the Court of Appeals upheld the portion of the trial court's decision to the extent that willful and wanton can, in some instances, constitute intentional.

However, on the issue of whether York's conduct rose to the level of intentional so as to trigger the exception found in §3135, the Court of Appeals

held in favor of Defendant, despite finding that York's conduct was willful and wanton. The court indicated that Defendant exercised poor judgment but that there was no indication that he intended to cause the harm. The court decided that while "Defendant's conduct might be regarded as sufficiently reckless as to come within the broad definition of 'willful and wanton'...it does not come within the narrower construction of 'willful and wanton' that must be utilized in this case -- a construction that equates with 'intentional' as required by §3135." (**Exhibit 5**, pp. 3-4).

Plaintiffs now appeal this decision from the Court of Appeals. As will be illustrated below, not only does this decision create a convoluted and impossible standard by which to judge application of §3135 of the No-Fault Act, it is really an issue of first impression at the Supreme Court level. Consequently, a determination by this Court is necessary to clarify the definition of intentional and settle the conflict between previous decisions rendered by the Court of Appeals on this issue.

ARGUMENT

I. NECESSITY FOR SUPREME COURT CONSIDERATION

The primary issue in this appeal is the interpretation of MCL 500.3135(3) and the definition of "intentional" as found therein. The Michigan Court of Appeals is the only court which has addressed this issue and has done so in only

two published opinions. Citizens v Lowery, 159 Mich App 611; 407 NW2d 55 (1987); Hicks v Vaught, 162 Mich App 438; 413 NW2d 28 (1987). These opinions, which were released within six months of each other - - Lowery being the first released - - set forth inconsistent applications of MCL 500.3135(3).

In Citizens v Lowery, a 15-year old, Defendant Lowery, had stolen a vehicle owned by Citizens' insured, Francis S. Kinkle. In Lowery, the trial court found that the 15-year old minor had operated the vehicle in a manner which was "reckless to the point of being willful and wanton misconduct", resulting in damage to the Citizens' insured vehicle and garage. Citizens paid the collision loss on insured vehicle and also paid no-fault property protection benefits to the owner of the damaged garage and the parked car. Citizens, then, as subrogee of its insured, brought an action under the parental liability statute to recover a portion of the damages it had paid out as property insurer.

The Defendant in Lowery, argued that its liability had been abolished by the provisions of the No-Fault Act, citing to the court MCL 500.3135, because the damage was caused by the operation of a motor vehicle. Lowery, 159 Mich App at 614. The court rejected Defendant's argument, finding that §3135(3)(a) of the No-Fault Act did not abolish tort liability in that case because the *reckless* operation of the stolen vehicle constituted willful and wanton misconduct, which falls within the *intentional* acts contemplated by the exception to the No-Fault

Act's immunity found in MCL 500.3135(3). Lowery, 159 Mich App at 617-618. Gibbard v Cursan 225 Mich App 311; 196 NW 398 (1923). The court noted that willful and wanton misconduct is in the same class as intentional wrongdoing. The Lowery court reasoned that "because acts resulting from willful and wanton misconduct fall within the class of intentional acts, Defendant's tort liability in the instant case is not abolished by the No-Fault Act". Id.

Thereafter, the Court of Appeals decided Hicks v Vaught, 162 Mich App 438; 413 NW2d 28 (1987). Therein, in a very short opinion, the court determined that MCL 500.3135(3) of the No-Fault Act requires that a person "intend to cause harm to a person or property and not merely...intend to do the act which causes the harm." Hicks, 162 Mich App at 440. The Hicks court did not to define intentional or what constitutes intent to cause harm.

In the case at hand, the Court of Appeals determined that "willful and wanton" can mean the same as "intentional", triggering the exception contained in §3135 of the No-Fault Act. However, the court also held that at the same time, "willful and wanton" can merely take on a meaning of "recklessness" which the Court of Appeals in this opinion determined did not sufficiently rise to the level of "intentional" to trigger the exception found in §3135(3). The court also found that York's conduct of setting up a prior designated driver plan (because he intended to drink); acting on that plan to the extent that he called his wife to the bar

recognizing that he had consumed an immoderate amount of alcohol; and then subsequently consciously decided to abandon the plan, drive, and disregard a stop sign which resulted in a collision causing the death of Mr. Coats, could be sufficiently "reckless" to fall under the definition of "willful and wanton conduct". However, even though making a determination that the conduct was willful and wanton, the court indicated that it did not sufficiently rise to the level of "intentional" to trigger the exception found in §3135(3).

The three opinions described above all appear to be saying something different relative to the application of §3135(3). In addition, the most recent opinion issued in the case at hand convolutes the definition of willful and wanton, intentional, and reckless, and leaves the parties with no clear definition of what would satisfy "intentional" under MCL 500.3135(3). To that end, this would be a case of first impression for the Supreme Court in that no Michigan Supreme Court panel has rendered a decision on this specific issue. The inconsistency of the prior decisions necessitates a decision by the higher court to clearly define the application of this statute and the term "intentional".

Moreover, the most recent decision issued by the Court of Appeals in the case at hand, creates an impossible standard by which to judge application of §3135. Future courts will be forced to make a case by case determination of whether the acts of the tort feasor are sufficient to rise to the level of a "willful and

wanton" conduct which is sufficient to render it "intentional" as opposed to simply "willful and wanton/reckless" behavior. The ruling of the Court of Appeals in the case at hand creates a totally impractical standard for future application by courts.

This is particularly true in light of the fact that the overwhelming majority of serious motor vehicle accidents involve the use of alcohol. For the Court of Appeals to imply that the use of alcohol in the context of this case is sufficient to make it "willful and wanton," but then to create two separate definitions of "willful and wanton," creates even greater confusion than existed after the earlier decisions of Lowery and Hicks. As a result, parties who are engaged in litigation relative to an accident involving alcohol and drunk driving are left with no clear determination of whether such conduct can rise to the level of "intentional" in some instances or never rises to the level of "intentional". As such, this case necessitates determination by the Supreme Court to clarify the application of this exception found in MCL 500.3135(3)(a).

II. THE COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT AND DETERMINING THAT MR. YORK'S CONDUCT WAS "WILLFUL AND WANTON" BUT NOT OF THE NATURE TO SATISFY THE "INTENTIONAL" HARM REQUIREMENT FOUND IN MCL 500.3135(3).

A. Standard of Review

Matters of statutory interpretation are questions of law. Donaj-Kowski v Alpena Power Co., 460 Mich 243, 265-66; 596 NW2d 574 (1999). This Court reviews questions of law under a de novo standard. DiBenedetto v West Shore Hosp., 461 Mich 394, 401; 605 NW2d 300 (2000).

This Court reviews findings of fact under the clearly erroneous standard. Fletcher v Fletcher, 447 Mich 871, 877; 526 N W 2d 889 (1994). A finding of fact is clearly erroneous only when the reviewing court is left with a definite and firm conviction that a mistake has been made. In re Terry, 240 Mich App 14, 25; 610 N W 2d (2000).

B. The Conduct Pled in Plaintiffs' Complaint is intentional conduct under Sec. 3135(3)(a).

Mr. York's conduct of abandoning a "designated driver" plan and driving while drunk rises to the level of intentional conduct as anticipated by §3135(3)(a) of the No-Fault Act. In the Court of Appeals, Defendant argued that the provisions of MCLA 500.3135(3)(a) do not apply because Plaintiffs' Complaint has allegedly failed to plead the type of "intentional harm" necessary for this exception. In

support of this assertion, Defendant cited only the self serving conclusion on his part that Plaintiffs have limited their characterization of the Defendant York's conduct to "willful and wanton misconduct." Defendant asserted that this is not sufficient for purposes of the exception to the immunity provided by the Michigan No-Fault Act.

Contrary to the Defendants assertions, Plaintiffs' First Amended Complaint expressly alleges the very type of "intentionally caused harm" set forth in §3135(3)(a). (See Complaint paragraphs 16-20, attached hereto as **Exhibit 1**). The trial court even rendered this same determination by calling Mr. York's **decision** to abandon a designated driver plan and drive after having consumed alcohol as *"intentional."* While the trial court does cite to Citizens Ins Co v Lowery, 159 Mich App 611 (1987), the trial judge never refers to the conduct as willful and wanton but, instead labels Defendant's conduct "intentional."

C. Michigan Case Law Dictates that "Willful and Wanton" and Even "Reckless" Conduct Rise to the Level of "Intentional" Conduct Anticipated in §3135(3)(a) of the No-Fault Act

"Willful and wanton" does rise to the level of "intentional" conduct as contemplated by §3135(3)(a). MCL 500.3135(3)(a) reads in pertinent part as follows:

> Notwithstanding any other provision of law, tort liability arising from ownership, maintenance, or use within this State of a motor vehicle…is abolished except as to:

(a) Intentionally caused harm to persons or property. Even though a person knows that harm to persons or property is substantially certain to be caused by his or her act or omission, the person does not cause or suffer such harm intentionally if he or she acts or refrains from acting for the purpose of averting injury to any person...or for the purpose of averting damage to tangible property.

Contrary to the Defendant's prior assertions, a review of Michigan case law interpreting "intentional" and "willful and wanton" illustrates that conduct amounting to"*willful and wanton" misconduct*, does rise to the level of *intentionally caused* harm as contemplated under the provisions of MCL 500.3135(a).

In Citizens v Lowery, 159 Mich App 611, the 15 year-old son of the Defendant Lowery had stolen a vehicle owned by Citizen's insured, Frances S. Kinkle. In Lowery, the trial court had found that the 15 year-old minor had operated the vehicle in a manner which was "reckless to the point of being willful and wanton misconduct", resulting in damage to the Citizens' insured vehicle and a garage. Citizens paid the collision loss on the insured vehicle and also paid No-Fault property protection benefits to the owners of the damaged garage and a parked car. Citizens, then, as subrogee of its insured, brought an action under the parental liability statute to recover a portion of the damages it had paid out as property insurer. Id.

As in this case, the Defendant in Lowery argued that its liability had been abolished by the provisions of the No-Fault Act, citing to the Court MCL

500.3135; 24.13135, because the damage was caused by the operation of a motor vehicle. See Citizens v Lowery, 159 Mich App at 614. The court rejected defendant's argument, finding that §3135(3)(a) of the No-Fault Act did not abolish tort liability in that case because the *reckless* operation of the stolen vehicle constituted willful and wanton misconduct, which falls within the *intentional acts* contemplated by the exception to the No-Fault Act's immunity found in MCL 500.3135(3)(a). Lowery, 159 Mich App at 617-618.

Citing the Michigan Supreme Court landmark opinion in Gibbard v Cursan, 225 Mich 311, 320; 196 NW 398 (1923), the Court noted that willful and wanton misconduct is in the same class as intentional wrongdoing. See Lowery, 159 Mich App at 617 (citing Gibbard, 225 Mich at 321). The Lowery court, also cited the Michigan Supreme Court case, Burnett v City of Adrian, 414 Mich 448, 462-463; 326 NW2d 810 (1982), in support of the proposition that "willful and wanton" misconduct amounts to intentional wrongdoing for purposes of §3135(3)(a). In doing so, the Court in Lowery reasoned as follows:

> Intentionally caused harm to persons or property is an exception to the No-Fault Act's abolishment of tort liability. MCL 500.3135(2)(a); MSA 24.13135(2)(a). (Act has recently been amended in 1995 and is now §(3)(a).) Because acts resulting from willful and wanton misconduct fall within the class of intentional acts, Defendant's tort liability in the instant case is not abolished by the No-Fault Act.

See Lowery, 159 Mich App at 617-618.

In the Court of Appeals, Defendants contended that this case was incorrectly decided. However, to make such an argument Defendants would have to also argue that a whole line of cases coming down from both this Court and the Michigan Supreme Court improperly interpreted the phrase "willful and wanton." In Burnett v. City of Adrian, 414 Mich 448, 455, 326 N.W. 2d 810 (1982) (emphasis added), the Michigan Supreme Court determined that willful and wanton conduct is "made out only if the conduct alleged shows an **intent** to harm, or if not that such indifference whether harm will result as to be the equivalent of a willingness that it does." The Court noted that willful and wanton is not a high degree of carelessness but instead a specific intent of indifference which amounts to willingness. As such, the court clearly interpreted the phrase to include intent. Id.

More recently in Boumelhem v Bic Corp., 211 Mich App 175, 185, 535 N.W. 2d 574 (1995), this Court determined that "[w]ilful and wanton misconduct is not a high degree of negligence; rather it is in the same class as intentional wrongdoing." These cases set precedent that willful and wanton is synonymous with intentional. Therefore, if this Court was to accept Defendant's argument that willful and wanton does not rise to the level of intentional, it would be contrary to previous cases including opinions issued by this Court.

In his argument in the Court of Appeals, Defendant also looked to the language in the statute to state that the Legislature only intended a "true" intentional tort. First, Defendant argued that the statute requires that the person "intend to cause harm." As noted directly above, using the words "willful and wanton" in relation to Defendant York's conduct means that he "intended" to cause the harm.

Defendant also looked to the second sentence of the statute in support of their argument. This portion reads as follows:

> Even though a person knows that harm to persons or property is substantially certain to be caused by his or her act of omission, the person does not cause or suffer that harm intentionally if he or she acts or refrains from acting for the purpose of averting injury to any person... MCL 500.3135(3)(a).

Defendant argued that by use of this specific language "the legislature would have no cause to expressly immunize from liability a person that acts 'know[ing] that harm ... to property is substantially certain in the limited circumstance provided if the statute otherwise did not contemplate such liability generally." In looking at the language as a whole, this argument does not make sense. The point of the second sentence in this statute is to immunize a person who is acting "knowingly" but in an effort to avert injury to a person. In fact, this language supports Plaintiffs' position in that it seems to define intentional as knowing harm

is substantially likely to occur. This carves an exception to the exception and helps define what is meant by intentional. This corresponds to the definition of willful and wanton set forth in case law.

Simply because the statute did not utilize the words "willful and wanton" does not necessarily mean that such conduct does not rise to the level contemplated by the legislature. The courts cited above are not engrafting a new standard as suggested by Defendant but, instead, defining what is *"intentional"* under the statute in compliance with a strong line of Michigan case law.

Defendant's previous reliance on Pavlov v Community Emergency Medical Serv., Inc., 195 Mich App 711, 491 N.W. 2d 874 (1992), appears misplaced. In Pavlov, the court was addressing the meaning of the statutory language of "gross negligence and willful misconduct." The court determined that use of the "willful and wanton" standard to define "gross negligence" and "willful misconduct" was improper. The Pavlov court's decision is appropriate given that case law has defined willful and wanton as rising to the level of an intentional act and the statute therein only required gross negligence. Clearly, the use of "willful and wanton" to define "gross negligence" went beyond the terms contemplated by the legislature.

This is not the case here. Here, the statute uses the term "intentional" and case law has clearly defined willful and wanton as intentional. Consequently, use

of this term does not fall outside the Legislature's indicated intent. Therefore, neither the trial court nor the Court of Appeals was engrafting a new standard but were instead, utilizing language which conveyed the same meaning - intentional conduct. As such, the Court of Appeals and the trial court's decision in this respect was proper and should be upheld.

However, the portion of the Court of Appeals decision which gives the phrase "willful and wanton" dual meaning is inconsistent with Michigan law and should be reversed. Herein, the Court of Appeals ruled that "willful and wanton" can rise to the level of intentional in some instances, but in others only equate with "reckless", which in the Court of Appeals' opinion does not rise to the level of intentional. As illustrated, time and again this Court as well as the Court of Appeals has determined that willful and wanton is synonymous with "intentional" as contemplated in §3135(3)(a). A decision providing dual meaning not only goes against precedent but also creates great confusion and an impossible standard by which to judge future cases under §3135(3)(a). Therefore, the portion of the Court of Appeals decision providing a dual meaning for the phrase "willful and wanton" should be reversed.

D. Mr. York's Conduct Was Intentional and Triggers Application of the Exception Found in § 3135 (3)(a) of the No-Fault Act

Review of the facts and testimony leads but to one conclusion: Mr. York's conduct was willful and wanton/intentional and should give rise to the exception contained in MCL 500.3135(3)(a). In the Court of Appeals, Defendant argued that intoxication alone does not rise to the level of intentional conduct as required under MCLA 500.3135(3)(a). Defendant cited Miller v. Inglis, 223 Mich App 159, 567 N.W. 2d 253 (1997), in support of this argument. The Court of Appeals agreed with this argument (**Exhibit 5**, p. 3). Plaintiffs contend that this argument is unfounded.

Herein, as noted by the trial court and evident from the facts, there was more than mere intoxication present. This case does not parallel other cases where a person merely drives while intoxicated. There are facts present which take this case above and beyond such factual scenarios. In this respect the trial court stated as follows:

> "In this case, Mr. York put a plan into place, and that plan was to have his wife pick him up, and he followed through on that plan by calling his wife, and then at some point when or after she arrived he **INTENTIONALLY ABANDONED THE PLAN** and knowing full well his condition was - that of intoxication, and I think there's more than an inference from the facts and from his deposition, there's knowledge of that factor - he then decides to drive.
>
> (Tr, p. 33-34 (emphasis added) **Exhibit 2**).

> It is the departure from that plan, or the abandonment of it on the part of the Defendant, that resulted in the tragedy in this case and, specifically, what's involved here is the damage to the DVA Ambulance. And this court finds that in deciding to drive solo, to drive that is, to operate his motor vehicle in an apparent condition to him, at least, of intoxication – and I say apparent, and the indicia for that is everything that preceded the calls to his wife to pick him up, that he was at the party, that he had been drinking, that that was the intent – all of that pre-staged this chain and series of events that were in place. So in terms of the statute and the policy, this court feels – and, again, I think the Lowery case is pretty much in point, not because there should be an arbitrary application to all facts where there's a drunk or intoxicated driver, but for the reasons I already stated in the Summary Disposition Motion, I feel that in the analysis here there is an application of the exception and in the case before the court there is tort liability here. (Tr, pp. 104-107, **Exhibit 2**)
>
> The court finds that the act of driving here on the part of Mr. York was intentional, that under the circumstances that this factual scenario I have laid out here that the intentional act is willful and wanton and, again, in the words of the Gibbard case, 'if one willfully injures another, or if his conduct in doing injury is so wanton or reckless that it amounts to the same thing, he is guilty of more than negligence. (Tr, pp. 104-107, **Exhibit 2**)

This ruling points to two factors which take this case outside the typical drunk driving case. First, Mr. York put a plan, a designated driver plan, into place with his wife (Tr, p 48, **Exhibit 2**). He knew he needed to follow through on the plan because, after drinking a shot of liquor and approximately one to two beers an hour, he called his wife to come get him. He was, in effect, reemphasizing the need for the plan. (Tr, p 41-42, 55-57, **Exhibit 2**). However, after his wife arrived

he made a conscious decision, being aware of his condition after drinking, to abandon the designated plan and drive himself home (Tr, pp 60-63, 82-83, **Exhibit 2**). This, in effect, constituted the "intentional" act on York's part. Mr. York intentionally abandoned a plan for safety and drove knowing that he had consumed a lot of alcohol. This conscious decision-making takes these facts outside a typical drunk driving situation into an intentional act with the knowledge of his intoxicated condition and the acknowledged reality that harm could occur.

The other factor, which illustrates intent, was that Defendant, York, disregarded a stop sign he was admittedly familiar with because of his decision. Testimony revealed that he was very familiar with the area and had driven it for over 15 years (Tr, pp 51-52; Dep, pp. 36-37) He knew the roads and the stop signs. Nevertheless, when he was driving home on December 23, 1997, he chose to disregard the stop sign at the intersection of Garrison and Bryon roads. This conduct was intentional and invokes the exception set forth in MCL 500.3135(3)(a). As appropriately pointed out by the trial court, it was York's decision to *"gamble"* by abandoning his plan to have his wife drive him home which lends another element of intent to this analysis.

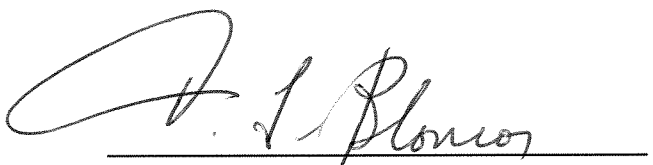
The trial court properly determined that the facts revealed intentional conduct as contemplated under MCL 500. 3135(3)(a). Defendant York intended to abandon a safe plan and drive knowing that he was under the influence of

alcohol. He also chose to disregard a stop sign at an intersection through which he had driven for over 15 years and was therefore very aware that the stop sign existed. Consequently, the facts set forth illustrate intentional conduct thereby triggering the personal property protection benefit exception set for in MCL 500. 3135(3)(a). Therefore, the decision of the Court of Appeals on this issue should be reversed and the trial court's determination reinstated.

CONCLUSION

Based upon the above arguments, Plaintiffs request that this Court grant leave to clarify application of MCL 500.3135(3)(a) and define "intentional" as contained therein. In such review, Plaintiffs request that this Court reverse the Court of Appeals and reinstate the judgment entered by the trial court.

BLANCO & ASSOCIATES, P.C.



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